IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

GLENDA CLARK, ROBERT WILLIAMS, FRANK SMOTHERS, JEFF CLARK, JAN CLARK, and IVY INVESTMENTS, INC.

V. NO. 1:97CV210-B-D

D.C. PARKER, ROBERT R. ADDINGTON, CONSOLIDATED TECHNOLOGIES CORPORATION, G.E. CAPITAL MODULAR SPACE, TRANSPORT INTERNATIONAL POOL, INC., RICHARD B. FLOWERS, LLOYD LINK and wife BETTY LINK, and LINK & ASSOCIATES

MEMORANDUM OPINION

This cause comes before the court upon the motion of the defendants, D.C. Parker and Richard B. Flowers, for summary judgment. The defendants Lloyd Link, Betty Link, and Link & Associates (hereinafter the "Link defendants") have filed a letter motion asking that they be allowed to join in Parker and Flowers' motion for summary judgment. For the reasons set forth herein, the court will allow the Link defendants to join in the motion for summary judgment. Upon due consideration of the parties' memoranda and exhibits, the court is ready to rule.

FACTS

Parker and Flowers are farmers and landowners who own land at and around Mhoon Landing in Tunica County, Mississippi. When casinos were first legalized in Mississippi in the early 90's, statutory regulations made Mhoon Landing on the Mississippi River the closest point to Memphis, Tennessee, that the casinos could be built. Parker and Flowers sold or leased various parcels of property at Mhoon Landing and announced plans to develop roads and other infrastructure in the area. By September of 1993, one casino was in operation at Mhoon Landing and others were being built on the premises.

The plaintiffs are a group of individuals with no prior experience in investing in

commercial real estate. In August of 1993, Lloyd Link approached the plaintiffs about the potential for development in Tunica County as a result of the burgeoning casino industry. In early September of 1993, Link notified the plaintiffs that he had located 5.0 acres of land in Tunica, Mississippi, on Highway 61 which would be perfect for a hotel. The property was owned by a Mr. Sugar. Link obtained a contract on behalf of the plaintiffs for the sale of the Sugar property on September 2, 1993. On or about that same date, the plaintiffs formed Ivy Investments, which was officially incorporated in Alabama on October 14, 1993.

On or about September 29, 1993, the deal on the Sugar property fell through. However, Link had been in contact with Parker and Flowers throughout September and, at the time the deal on the Sugar property fell through, Link told the plaintiffs that they could purchase 5.5 acres at Mhoon Landing for $250,000.00, which was the same purchase price as the Sugar property. Link had already scheduled a closing and had given Parker and Flowers a check for $50,000.00 as a down payment[1]. The plaintiffs, based on Link's representation as to the desirability of the property and Parker and Flowers' representation concerning their intentions of developing infrastructure, voted to purchase the Mhoon Landing property.

On October 3, members of Ivy Investments met with the Links to make arrangements for the closing. The president of Ivy Investments, Loye Russell, expressed some concerns about Link and indicated that he intended to attend the closing. Link insisted that Russell be removed from the group. The other members of Ivy Investments complied rather than risk jeopardizing the deal. Link and Glenda Clark bought out Russell's share of the investment. Link insisted that the others not attend the closing. Link attended the closing with his wife, Betty, who signed the closing documents on behalf of Ivy Investments.

The purchase price on the original closing statement was $200,000.00. However, on the closing statement received by the plaintiffs, the purchase price had been altered to state

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[1] Parker and Flowers deny ever receiving this $50,000.00.

$250,000.00. The type style of the purchase price reflected on the closing statement received by the plaintiff was clearly different from that in the remainder of the document. Glenda Clark admits that in November of 1993, she noticed the obvious difference in the type style of the purchase price. Although she suspected that the document had been altered, she waited until February of 1997 to obtain a copy of the original closing statement from the closing attorney. Jeff Clark likewise noticed the difference in the type style of the altered closing statement, and he had suspicions about Link from the start, but he took no action in either regard.

After the closing, the plaintiffs began making preparations for the construction of a hotel, but construction never began. Although Parker and Flowers maintained that the area was being developed, little development occurred. Not long after the sale of the property, the legislature changed the statutory regulations regarding the locations of casinos. As a result, Robinsonville and Commerce Landing, upriver from Mhoon Landing, became the closest points to Memphis available for casino development. The Mhoon Landing casinos moved, Parker and Flowers never developed any infrastructure, and the plaintiffs, who never built their hotel, are left with 5.5 expensive acres of land in the middle of Parker and Flowers' field.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c)

mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

Miss. Code Ann. § 15-1-29 sets forth a three year statute of limitations on matters arising out of unwritten contracts. Miss. Code Ann. § 15-1-49 likewise sets forth a three year statute of limitations on all other matters not specifically provided for in the statute. Claims arising out of securities fraud have a two year statute of limitation as provided in Miss. Code Ann. § 75-71-725. The acts of which the defendants are accused occurred in October of 1993. The plaintiffs did not file suit until July 7, 1997; thus, on their face, the plaintiffs' claims are barred by the applicable statute of limitations.

The plaintiffs assert that the statute of limitations should be tolled by the doctrine of fraudulent concealment. Mississippi law provides that:

> If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

Miss. Code Ann. § 15-1-67. Thus to assert fraudulent concealment, the plaintiffs must allege that the defendants concealed the conduct complained of and that the plaintiffs failed to discover the facts forming the basis of their claims, despite the exercise of due diligence. State of Tex. v. Allan Constr. Co., 851 F.2d 1526, 1528 (5th Cir. 1988); United Klans of Am. v. McGovern, 621 F.2d 152, 153 (5th Cir. 1980) (citing In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1169 (5th Cir. 1979), cert. denied, 449 U.S. 905, 66 L. Ed. 2d 137 (1980). The plaintiffs contend that the Parker and

Flowers misrepresented their commitment to develop the Mhoon Landing area and fraudulently concealed their misrepresentations until just recently by continuing to insist that they would construct infrastructure on the premises. However, the latest date upon which the plaintiffs can show that Parker and Flowers may have actively concealed their intentions is March of 1994, at which time Parker and Flowers issued a press release announcing a master plan for development of Mhoon Landing. The date of Parker and Flowers press release is well-over three years prior to the date the plaintiffs filed this suit.

The plaintiffs assert that they made reasonable efforts to discover the defendants' misrepresentations by frequently stopping by Parker's office to inquire about the status of Mhoon Landing. According to the plaintiffs, each time they would ask Parker about development of Mhoon Landing he would reply that it "looked better than ever." However, a visit to the premises revealed the truth–that no development was taking place. The plaintiffs were frequently in the Mhoon Landing area working on developing their hotel and it should have been obvious to all concerned that the proposed infrastructure at Mhoon Landing by Parker and Flowers was non-existent.

For the plaintiffs' claims to be filed within the statute of limitations, the court would have to find that the plaintiffs could not, through the exercise of reasonable diligence, discover the fraudulent concealment of their causes of action until at least July 7, 1994. To the contrary, the court finds that the plaintiffs have produced no evidence by which a reasonable person could believe that they could not have discovered their alleged causes of action until that date. Any claim of fraudulent concealment arising out of the failure to develop infrastructure at Mhoon Landing should have been discovered by the lack of progress by Parker and Flowers in developing the area. As to any claim of fraudulent concealment arising out of the apparent alteration of the closing statement, the court likewise finds that it should have been discovered long before July 7, 1994. Glenda Clark realized the document appeared to have been altered and became suspicious as early as November of 1993. The plaintiffs were in Tunica on numerous occasions and could have easily reviewed the original closing statement to see if it had been

altered. In fact, that is just what Glenda Clark did in February of 1997, at which time she finally confirmed the discrepancy. Jeff Clark likewise noticed the inconsistency in the type face on the altered closing statement, but failed to investigate the cause. Other red flags that should have warned the plaintiffs of potential trouble were Link's insistence that none of the plaintiffs attend the closing and his request that Loye Russell be removed from the group when Russell expressed some concerns about Link. In sum, the court finds that the plaintiffs have failed to show that their cause of action could not have been discovered through reasonable diligence until on or after July 7, 1994.

Furthermore, the plaintiffs' claim that Parker and Flowers fraudulently concealed their intentions regarding the development of Mhoon Landing involves a promise of future conduct. To show a fraudulent misrepresentation concerning a claim of future conduct, the plaintiffs must show a present intent not to perform. Bank of Shaw v. Posey, 573 So. 2d 1355, 1360 (Miss. 1990). The plaintiffs have failed to produce any evidence that Parker and Flowers did not really intend to develop Mhoon Landing at the time the plaintiffs purchased the property.

Unfortunately for the plaintiffs, the change in the statutory regulations regarding the location of the casinos changed the concept of how the Mhoon Landing property was to be used. After the regulations changed, all of the casinos left Mhoon Landing. It is reasonable to presume that the defendants had every intention to develop the area, but saw no reason to do so after the casinos left. Indeed, the plaintiffs, themselves, have failed to follow through with their development plans.

Since the statute of limitations defense appears to be a valid bar to the plaintiffs' cause of action against all defendants, the court finds that the Link defendants should be allowed to join in Parker and Flowers' motion for summary judgment.

CONCLUSION

For the foregoing reasons, the court finds that the defendants' motion for summary judgment should be granted. An order will issue accordingly.

THIS, the ____ day of April, 2001.

NEAL B. BIGGERS, JR.
CHIEF JUDGE

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ORDER

In accordance with the memorandum opinion this day issued, it is **ORDERED**:

that the defendants' motion for summary judgment is **GRANTED**; and

that this cause of action is **DISMISSED with prejudice**.

THIS, the ____ day of April, 2001.

NEAL B. BIGGERS, JR.
CHIEF JUDGE